# 93-905

No. _____

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

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JOHN W. STRASBURG and
ELDERCARE ASSET PROTECTION PLANS, INC.,
*Petitioners,*

v.

STATE BAR OF WISCONSIN, GERALD C. STERNBERG, JOHN A. BOLZ, JOHN E. SHANNON, EDMUND MANYDEEDS III, JACQUELINE BOHMAN, WILBUR W. WARREN III, MICHAEL WHERRY, MICHAEL FAUERBACH, LISA LOTTE CAMELTOFT, PATRICIA GROVE, ROBERT J. KAY, CELIA SERAPHIM, and DIANE ZORE,
*Respondents.*

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*On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 9, 1993

57 pp

## QUESTION PRESENTED

Whether, under the doctrine of finality for appealablity purposes and under the provisions of Rule 4(a)(2) of the Federal Rules of Appellate Procedure, the Court of Appeals erred in dismissing, for lack of appellate jurisdiction, the appeal below, taken by notice of appeal referring to an order granting summary judgment in favor of the only defendant served in the action?

## LIST OF PARTIES TO THE PROCEEDINGS BELOW

The identity of the plaintiffs in the action before the District Court below corresponds exactly to the appellants before the Court of Appeals below.

The plaintiffs below were John W. Strasburg and ElderCare Asset Protection Plans, Inc. Both are petitioners in this Petition For Writ Of Certiorari. There are no parent corporations or entities of, or subsidiaries of, either wholly owned or owned in part by ElderCare Asset Protection Plans, Inc.

The complete list of defendants initially named in the District Court below is as follows: State Bar of Wisconsin, Board of Attorneys Professional Responsibility, Gerald C.

Sternberg, John A. Bolz, John E. Shannon, Edmund Manydeeds III, Jacqueline Bohman, Wilbur W. Warren III, Michael Wherry, Michael Fauerbach, Lisa Lotte Gameltoft, Patricia Grove, Robert J. Kay, Celia Seraphim, Diane Zore, and the Supreme Court of the State of Wisconsin. However, of all of these, service of process was only ever effected on Gerald C. Sternberg. Early dismissal by the District Court of the Board of Attorneys Professional Responsibility and the Supreme Court of the State of Wisconsin on immunity grounds was not appealed.

All of the other aforesaid defendants were denominated as appellees before the Court of Appeals on the appeal below. For this reason, they are all named as respondents in this Petition For

Writ Of Certiorari, in accordance wi^h Supreme Court Rule 19.6.

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Respondents.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, 1a) is reported at 1 F.3d 468. The Opinion of the District Court dated November 15, 1991 (App., *infra*, 32a), is unreported. The Opinion of the District Court dated April 9, 1991 (App., *infra*, 73a), is also unreported.

## JURISDICTION

The jurisdiction of the District Court below in this case was based on 15 *U.S.C.*, Sections 1, 2, 15 and 26, and on 28 *U.S.C.*, Sections 1331, 1337 and 1343.

The Judgment of the Court of Appeals was entered on July 9, 1993. Rehearing was denied on August 12, 1993. App. 104a. The gist of the decision by the Court of Appeals in this case was that the Court of Appeals lacked

jurisdiction by reason of employment of a notice of appeal procedure by petitioners deemed defective by the Court of Appeals. Petitioners contend herein that the Court of Appeals in fact had jurisdiction, and the case was properly "in" the Court of Appeals, for purposes of 28 *U.S.C.*, Section 1254 (1). Hence, this Court has jurisdiction under 28 *U.S.C.*, Section 1254(1). In any event, this Court also has jurisdiction under 28 *U.S.C.*, Section 1651.

## RULE INVOLVED

Rule 4(a) of the Federal Rules of Appellate Procedure provides as follows:

"(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of

right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to

amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motions as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure."

## STATEMENT OF THE CASE

Petitioners, John W. Strasburg and ElderCare Asset Protection Plans, Inc. (hereinafter, "Strasburg" and "ElderCare", respectively, or "petitioners", collectively) filed suit against the State Bar of Wisconsin, thirteen members of the Board of Attorneys Professional Responsibility (hereinafter, The "Board" or "BAPR"), and the Board's Administrator, Gerald C. Sternberg (hereinafter, "Sternberg"). Of

all these, however, service of the Summons and Complaint herein was effected only on Sternberg. As stated above, the jurisdiction of the District Court below in this case was based on 15 *U.S.C.*, Sections 1, 2, 15 and 26, and on 28 *U.S.C.*, Sections 1331, 1337 and 1343.

Before the case now at bar, plaintiffs had attempted to conduct a business centering on Medicaid eligibility administrative representation, advising, and related financial planning activities. The basic gravamen of this action concerned allegations of conduct of the defendants, especially Sternberg, which, although cloaked as official actions in pursuit of the lawyer discipline process, in reality amounted to an attempt to harass and intimidate plaintiffs out of conducting

their business, thereby violating plaintiffs' free speech rights, and also violating antitrust statutes and the supremacy of federal regulations concerning Medicaid representation and ancillary activities.

On November 15, 1991, the district court herein granted a motion for summary judgment to Sternberg on the ground that his actions as alleged in the Complaint were shrouded in "absolute quasi-judicial immunity" because of his position as Administrator for BAPR (App., *infra*, 32a). The same Order granting that summary judgment also dismissed without prejudice all claims against the remaining defendants due to lack of service of process within 120 days of the filing of the Complaint. (See November 15, 1991 Opinion and Order, slip op. page

19). It should be noted with painstaking clarity that the grant of summary judgment in favor of defendant Sternberg clearly meant that the action could not be refiled as to him.

Petitioners filed motions on December 16, 1991 for reconsideration, for leave to conduct discovery, and for leave to refile their Complaint as to the remaining defendants, meanwhile also filing a Notice of Appeal as to the portion of the Order of November 15, 1991, which had granted Sternberg's summary judgment motion. On December 27, 1991, the District Court denied those motions, and it dismissed the Complaint with prejudice as to the remaining defendants (App., *infra*, *107*a). On December 30, 1991, judgment was entered (App., *infra*, 120a).

The ultimate decision of the Court of Appeals as to a lack of appellate jurisdiction (App., *infra*, 1a) completely surprised petitioners even though it had been discussed at argument. The reason for the surprise was the amount of time between argument and decision. Petitioners immediately moved for rehearing. However, the Court of Appeals denied that motion (App., *infra*, 104a). This Petition For Writ Of Certiorari then was filed, challenging the Court of Appeals interpretation and application of the provisions of Rule 4(a) of the Federal Rules of Appellate Procedure.

## REASONS FOR GRANTING THE WRIT

### I.

### IN THIS CASE THE SEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL APPELLATE JURISDICTION IN IMPLICIT CONFLICT WITH PRINCIPLES ENUNCIATED IN APPLICABLE DECISIONS OF THIS COURT.

Under *Supreme Court Rule* 10.1(c), it constitutes a special and important reason arguing for grant of a petition for writ of certiorari that the court of appeal below has decided a federal question in a way which conflicts with applicable decisions of this Court. Such is the case herein.

Both the Court of Appeals' underlying Opinion and its denial of rehearing overlook and misconstrue the controlling precedent in the recent decision of this Court in *FirsTier Mortgage Co. v. Investors Mortgage Ins.*

*Co.*, 498 U.S. 269, 111 S.Ct. 648, 1122 L.Ed.2d 743 (1991) (about which more *infra*, this Section of Reasons For The Writ).

Before we can address the thrust of the *FirsTier* decision, however, we must begin with the observation that Rule 4(a)(1) of the *Federal Rules of Appellate Procedure* itself allows appeals from orders, as well as from judgments. In this case, the gist of appellees' jurisdictional contention in the Court of Appeals below was that the Notice of Appeal allegedly did not invoke the jurisdiction of that court, on the observation that the Notice came before the judgment and referenced the November 15, 1991 Order instead. The implication of this argument is that a notice of appeal can only be from a judgment

itself. This is simply not so under Rule 4(a)(1), supra.

It is universally accepted that if orders are final, they are appealable. *Knibb, Federal Court of Appeals Manual* (West, 2d ed. 1990), Section 7.3, p. 48. The necessary implication from the Court of Appeals Opinion is that an appeal can only be taken from a judgment itself. This is simply not so under Rule 4(a)(1), *supra*, and under *FirsTier, supra*.

Indeed, even the Seventh Circuit itself, in *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, at 756 (7th Cir. 1988), cited by the court of Appeal's opinion below, specifically held that, where finality is presented, "the absence of a Rule 58 judgment will not defeat appellate jurisdiction. See *Bankers' Trust v. Malis*, 435 U.S. 381,

385-88, 98 S.Ct. 1117, 1120-1, 55 L.Ed.2d 357 (1978)..." In this case, however, the Seventh Circuit has disregarded its own acknowledgment in *Smith-Bey of Bankers' Trust* to that effect, and has also shrugged off the impact of *FirsTier, supra.* In this respect, the Seventh Circuit has flagrantly ignored controlling authority of this Court through a sheer exercise of will in disposing of petitioners' appeal below.

By ordering entry of judgment with prejudice as to the served defendant, the Opinion and Order dated November 15, 1991, effectively did dispose of the case in the district court. The fact that the order was contained in a document does not prevent the order portion from having the requisite finality it possesses. The fact that "legal reasoning" appeared in

the Opinion portion of that document does not change the decisional character of the Order portion. The Order portion did not contain any legal reasoning. Without any doubt, however, that order did deny all relief as to the sole served defendant.

Therefore, it was perfectly clear that nothing more which petitioners might then have done could in any way have prevented the inexorable entry of judgment against them as to the served defendant. Even if petitioners had served the remaining defendants and attempted to carry the case on against them, eventually and inevitably, judgment in favor of the served defendant would have been entered.

Under such circumstances of clear intent to follow through with entry of

judgment, the decision is already deemed final for appeal purposes. *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631, 633 (1945). As in *Catlin*, all that remained was the execution of the inevitable judgment by the district court. This has specifically been applied in the instance of dismissal of a complaint as to all served defendants, notwithstanding the existence of unserved defendants. *FSLIC v. Tullos-Pierremont, supra*.

Rule 4(a)(2) of the *Federal Rules of Appellate Procedure* codifies this latter precept by validating an appeal taken from an order for judgment, once the judgment is entered, essentially in a *nunc pro tunc* approach, termed "relating forward". Accordingly, the notice of appeal filed below should have been

deemed to relate forward to the date of the entry of judgment.

Rule 4(a)(4) of the same Rule, after the amendment thereto in 1979, bars the application of the relating forward under Rule 4(a)(2) where certain post-trial motions are pending at the time of, or follow the notice of appeal. However, as the Court of Appeals itself pointed out, since any such motions made to the District Court below were untimely and therefore of no effect, the notice of appeal below could still relate forward under Rule 4(a)(2). (App. 10a, n. 2).

However, ruled the Court of Appeals below, the fact that unserved defendants remained after summary judgment was granted to Sternberg both prevented finality and barred the relating forward, on the contention that further

proceedings were then contemplated by the District Court as to such other defendants (App. 17a).

The 1979 amendment to Rule 4(a)(4) has been criticized as "creat(ing) a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending." Advisory Committee Notes to Rule 4, *Fed. R. of App. Proc.*, at *U.S.C.A.*, p. 942. A proposed amendment to Rule 4 may soon remove that pitfall, and thereby allow such notices of appeal to survive. *ibid.* However, as noted, *supra*, Rule 4(a)(4) does not apply herein, and hence, that amendment will not address the unserved defendants situation faced squarely herein.

Having laid this background, we turn now to *FirsTier Mortgage Co. v. Investors*

*Mortgage Ins. Co.*, 498 U.S. 269, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991). The decision below as to which review is sought does indeed ignore the impact of that case. *FirsTier* concerned an appeal from an order declaring that summary judgment would be entered, as did this case. In fact, in *FirsTier* the "announcement" of that order was merely a bench decision, and did not consist of any document at all. *A fortiori*, the *FirsTier* precept applies even more strongly herein, where the grant of summary judgment in the Order of November 15, 1991, was a judgment in substance as to the served defendant's disposition, and lacked only the formal denomination as a judgment document.

Notwithstanding that the District Court in *FirsTier* had stated that both

findings of fact/conclusions of law and a memorandum opinion would intervene before issuance of the judgment document, this Court held that an appeal from the order was validated pursuant to Rule 4(a)(2).

Indeed, in the case at bar, no such further opinion or other judicial act remained as to the served defendant. Accordingly, as was the case in *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1222 (7th Cir. 1991), "as soon as the proper judgment was entered....(plaintiffs') notice of appeal (citing the prior order) accordingly sprang into force...."

Nothing more remained to be done in the case at bar with regard to summary judgment as to the served defendant, Sternberg, after the Order of November 15, 1991. Hence, it is as if the

judgment immediately followed that Order. In this light, the Notice of Appeal from that Order is immediately recognizable as validated under Rule 4(a)(2). See *Metropolitan Life, supra*.

The November 15, 1991 Order completely disposed of all claims against the served defendant. Given this, contrary to the Opinion of the Seventh Circuit below, it was indeed entirely reasonable, therefore, for petitioners to view that Order as functionally dispositive and final as to the served defendant.

The Opinion of the Seventh Circuit below attempts to skirt *FirsTier* by reasoning that it was unreasonable for petitioners to conclude from the November 15th Order that the litigation was at an end, due to the presence of unserved

defendants, as to whom petitioners might choose to proceed, thereby carrying on the case.

It should carefully be observed that no prior Seventh Circuit case had ever so held, either as to matters generally within the option of the appellant, or as to unserved defendants specifically. In what manner of reasoning petitioners' conclusion as to finality could then have been said to be 'unreasonable' is entirely unclear from the Court of Appeals' Opinion. The most that it says regarding prior Seventh Circuit authority is that the decision in this case can "peacefully coexist" with the closest prior decision, *Harris v. Milwaukee County Circuit Court*, 886 F.2d 982 (7th Cir. 1989), which the Court of Appeals found necessary to distinguish to arrive

at the adverse result herein. On such a lay of the law within the Seventh Circuit, petitioners' view of finality of the November 15th Order was thoroughly reasonable.

Moreover, as will appear more fully in the third Reason For The Writ, *infra*, decisions elsewhere seem universal in holding that unserved defendants do not interfere with finality at all, and that matters within an appellant's option are not bars to finality where they are not exercised by the prospective appellant. See, e.g. *Tullos-Pierremont, supra; Tiernan v. Devoe*, 923 F.2d 1024 (3rd Cir. 1991). Hence, considering such authority elsewhere, petitioners' conclusion as to finality was more reasonable still.

It would be both ironic and unjust if "reasonability", as used by this Court

in *FirsTier*, would be forced to depend on what circuit an appeal was within. The irony is only heightened further where, as herein, the particular circuit has no authority contrary to the conclusion reached by the appellant when filing the notice of appeal.

Therefore, in sum, the Court of Appeals' position below is not within the contemplation of, and in fact runs contrary to this Court's intent in *FirsTier*.

It should also be noted that the 120 day period for service was long expired below by time the District Court granted summary judgment. Hence, the order allowing service within 30 days was quite a surprise to petitioners, who had long since opted to pursue only defendant Sternberg.

*FirsTier* contrastingly illustrates an "unreasonable" view of finality with instantly recognizable examples of interlocutory orders, such as discovery rulings (111 S.Ct. at 563). Such mere acknowledgment that some extreme case of unreasonability exists to bar application of Rule 4(a)(2)'s saving provision cannot itself be taken to authorize the speculative and almost partisan critique by the Court of Appeals herein of a *prima facie* reasonable view by a litigant of finality. Reasonable is reasonable. Hence, petitioners assert that review is appropriate, in light of the transgression of the *FirsTier* standard presented by the decision below.

From the logic employed by the Seventh Circuit in holding jurisdiction to be lacking in this case, *a fortiori*,

it would also have held the appellant's view of finality to have been unreasonable in *FirsTier* as well in light of the more extreme facts of that case. Hence, the Seventh Circuit would have ruled contrary to the holding of this Court in *FirsTier*. This Court should act to square up this discrepancy and its indicated lack of comprehension of the significance of *FirsTier*.

Were the Seventh Circuit's standard of reasonability, as applied in this case, the prevailing one, then indeed, as *Smith-Bey*, *supra*, observed in rejecting such an austere approach, at 841 F.2d 755, every "litigant [would be] forced to guess or to do legal research as to whether a final decision has been rendered".

Whether the case might go forward in the District Court against other, unserved defendants was a question entirely divorced from the disposition as to the served defendant Sternberg. Nothing which might have been done, either by petitioners or the District Court, as to the unserved defendants could have resurrected petitioners' claims against the served defendant after the November 15, 1991 Order had granted summary judgment.

From that disposition, the District Court could just as appropriately immediately have entered a judgment effecting the summary judgment grant. See generally, Rule 54(b), *Federal Rules of Civil Procedure*, as to authorization for judgment as to some, but not all litigants. (Note that the finality

certification procedure of Rule 54(b) is not required as a precondition to finality in the case of unserved defendants. *Gomez v. Government of Virgin Islands, Dept. of Public Safety*, 882 F.2d 733 (3rd Cir. 1989); *Loman Development Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533, 1536 (11th Cir. 1987).

*Loman, ibid*, notes that "all of Loman's claims against [served defendants]" were adjudicated. Likewise herein, all claims against the served defendant were addressed and disposed of by the November 15, 1991 Order of the District Court below. That Order called for judgment for the served defendant, Sternberg, dismissing all claims against him "with prejudice".

The proper view of the existence of appellate jurisdiction herein is shown by the mere substitution, with only immaterial differences, of the identities and dates in this case, for those in the *FirsTier* opinion itself, thus:

> "Had the judge set forth the judgment immediately following the [Order of November 15th], and had the clerk entered the judgment,... there is no question that the [Order of November 15th] would have been "final" under Section 1291. Under such circumstances, (petitioners') belief in the finality of the (November 15th) ruling was reasonable, and its premature (December 16th) notice therefore should be treated as an effective

notice of appeal from the judgment entered on (December 30, 1991)."

*FirsTier, at* 111 S.Ct. 653

It is clarified by *FirsTier* that such a ruling is to be deemed a "decision" under Rule 4(a)(2), and that a notice of appeal referring to such a ruling is subsequently validated, *nunc pro tunc*, upon entry of a subsequent judgment, as herein. Nothing could have been more simple or more controlling over the appeal below.

Nevertheless, the Court of Appeals below overlooked the sweeping, theoretical nature of the approach taken by this Court in *FirsTier*. Instead, the decision below appears to attempt to relegate *FirsTier* to a splitting of minutiae of the facts of a specific case. That decision also seems to view *FirsTier*

as allowing a singular attempt by the Court of Appeals, as a means of setting the limits of appellate jurisdiction in this case, to speculate at the state of mind of petitioners, both at the time they launched their notice of appeal, and at later times below.

That reading of *FirsTier* would be profound error. *FirsTier* clearly enunciates a philosophical view of the bounds of appellate jurisdiction under 28 *U.S.C.*, Section 1291 and Rule 4(a)(2) that quite dramatically represents a 'sea change', when contrasted to prior quarrels in the various circuits about the precise facts once thought critical to invocation of the savings provision of Rule 4(a)(2).

Illustratively, this Court's broad view is exemplified *by FirsTiers*

reference (at 111 S.Ct. 652) to cases such as *Ruby v. Secretary of Navy*, 365 F.2d 385 (9th Cir. 1966), which allowed a notice of appeal from a dismissal of a complaint (even though not foreclosing amendment of the complaint) to stand as an effective appeal from the subsequent dismissal of the action itself (when the complaint was not amended). This Court clearly declared in *FirsTier* that such cases more accurately show the original intent behind Rule 4(a)(2). Hence, the ruling in *FirsTier* stands as a clear determination that the hyper-technical approach used by some courts in intervening years had been out of keeping with that intent. Under *FirsTier*, there simply is no longer any room to so closely augur the entrails of the specific chronology of pre-judgment

events or to engage in fine distinctions about that chronology.

In closing, as the Court of Appeals itself pointed out in its Opinion herein, because petitioners' subsequent motions to the district court were untimely, there is no basis for the application of Rule 4(a)(4). Rather, as already shown, the general savings provision of Rule 4(a)(2) applies instead herein. As to the served defendant's liability, the Order of November 15, 1991, certainly was final, and an immediate judgment therefore would certainly have been appealable. Under *FirsTier* and the other authorities discussed, *supra*, *the* "relation forward" allowed by Rule 4(a)(2) clearly applied to the Notice of Appeal herein, validating it as soon as judgment was entered on December 30, 1991.

II.

IN THIS CASE, THE SEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL APPELLATE JURISDICTION WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

Alternatively to the foregoing Reason, also under *Supreme Court Rule* 10.1(c), it is a distinct, special and important reason to grant of a petition for writ of certiorari that the court of appeals below has decided an important federal question which has not been, but which should be settled by this Court.

Here, we assume, strictly *arguendo*, that no conflict with *FirsTier*, *supra*, or with any other Supreme Court precedent is presented by the Court of Appeals decision below herein. However, it then becomes apparent in any case that the important question of the correct and reasonable construction of appellate

jurisdiction is one that should be settled by this Court, in light of the seeming clash between *FirsTier* and the ruling below.

Contrasting sharply with this Court's approach in *FirsTier*, the decision of the Court of Appeals below in this case is a novel, overly-aggressive application of denial of appellate jurisdiction. In fact, the decision below rests on the subjective basis of that court's attempt to read the plaintiffs' state of mind, as a purported reflection of "unreasonability". This attempt to find 'hidden unreasonability' behind an objective appearance of reasonability presents an important question, worthy of close evaluation by this Court.

Not only does the Court of Appeals decision herein seem to conflict with both *FirsTier* and the plain terms of Rule 4(a) itself, but it also is irreconcilable with prior decisions of the Seventh Circuit itself, without recognizing any intervening change in approach. *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, at 756 (7th Cir. 1988), cited by the court of Appeal's opinion below, specifically held, in favor of appellants, that an order dismissing claims with prejudice is final for appealability purposes. The functionally identical dismissal with prejudice here of all claims against the sole served defendant should have yielded a result identical to that in *Smith-Bey*.

As was the case in *Smith-Bey*, *supra*, in this case as well, with regard to the

served defendant, Sternberg, once the order dismissing with prejudice was issued, there was nothing more that petitioners could do with regard to claims against Sternberg except appeal. Even more explicitly yet, *Smith-Bey* went on to specifically hold that, where finality is thus presented, "the absence of a Rule 58 judgment will not defeat appellate jurisdiction. See *Bankers' Trust v. Malis, 435* U.S. 381, 385-88, 98 S.Ct. 1117, 1120-1, 55 L.Ed.2d 357 (1978)..." Neither should its absence have defeated appellate jurisdiction herein.

Similarly, as was the case in *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1222 (7th Cir. 1991), "as soon as the proper judgment was entered .... [plaintiffs'] notice of

appeal [citing the prior order] accordingly sprang into force...."

Because nothing more remained to be done in the case at bar with regard to summary judgment as to the served defendant, Sternberg, it is as if the judgment immediately followed that Order. In this light, the Notice of Appeal from that Order is immediately recognizable as validated under Rule 4(a)(2). See *Metropolitan Life, supra.*

If *FirsTier* is not in fact controlling herein, then the inconsistency between *Smith-Bey and Cammon*, on one hand, and the decision below in this case, on the other hand, demonstrates a profound confusion even within a given court of appeals about appellate jurisdiction under *FirsTier*. This state of confusion strongly suggests

the urgent importance of a clarifying ruling by means of review in this case.

III.

IN THIS CASE THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS AS TO FEDERAL APPELLATE JURISDICTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER.

Quite separately from the status of the Court of Appeals decision in this case *vis-a-vis* decisions of this Court, under *Supreme Court Rule* 10.1(a), it constitutes a distinct, important reason to grant certiorari that the decision of the court of appeals conflicts with a decision of another court of appeals on the same matter. Such conflict is unquestionably presented by the decision below.

The Order of November 15, 1991, in addition to granting summary judgment to the served defendant, Sternberg, also did

leave open for an additional period the possibility of serving previously unserved defendants. Yet this is no legal index of any lack of finality as to the final decision reached as to the served defendant, Sternberg.

Unserved parties are simply not parties at all, for purposes of a finality analysis, and hence, the potential for subsequent service upon them is routinely held in other circuits not to interfere with finality of either a judgment or an order. *Federal Savings and Loan Ins. Corp. v. Tullos-Pierremont*, 894 F.2d 1469, 1472-3 (5th Cir. 1990); *Insurance Co. of North America v. Dealy*, 911 F.2d 1096, 1099 (5th Cir. 1989); *Young v. Mt. Hawley Ins. Co.*, 864 F.2d 81, 83 (8th Cir. 1989); *Insinga v. LaBella*, 817 F.2d 1469 1470 (11th Cir.

1987); *Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986); *Leonhard v. United States*, 633 F.2d 599, 608-9 (2d Cir. 1980); *DeTore v. Jersey City Police Employees Union*, 615 F.2d 980, 982 at n.2 (3d Cir. 1980). Ironically, the Seventh Circuit itself was one of the first to enunciate this very principle. *Bradshaw v. Miners' Bank of Joplin*, 81 F. 902, 904 (7th Cir. 1897). Yet in the case at bar, it has forsaken it.

Where a judgment of dismissal is rendered as to all served defendants, and only unserved, nonappearing defendants remain, judgment is final and appealable. *Tullos-Pierremont, supra.* Likewise herein, all claims against the served party were addressed by the Opinion and Order appealed from. That order called

for the entry of judgment against plaintiffs on all those claims, dismissing them all "with prejudice". Therefore, notwithstanding that unserved defendants nominally remained in the action, the disposition should have been deemed final and appealable below.

Nevertheless, the Court of Appeals took the position that the unserved parties could be served, and that this fact purportedly deprived the summary judgment grant to Sternberg of finality. Yet ultimately, because the remaining defendants were not served, their dismissal was converted to dismissal with prejudice. It is obvious that this conversion retroactively rendered the prior disposition complete.

In contrast to the holding below, the Third Circuit has taken a position to

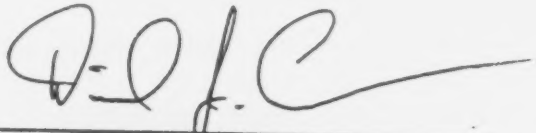
the contrary in analogous circumstances. *In Tiernan v. Devoe*, 923 F.2d 1024 (3rd Cir. 1991), that court observed that jurisdiction could be deemed lacking at the time of a similar summary judgment as to one group of parties, since a contemporaneous dismissal as to another group was then without prejudice. However, ruled the court, when the plaintiffs later renounced any intention to take any further action against that group of defendants, the jurisdictional problem was retroactively cured. *Tiernan* again points up the conflict between this case in the Seventh Circuit and the approach taken in similar cases in other circuits. See also *Gomez v. Government of Virgin Islands, Dept. of Public Safety*, 882 F.2d 733 (3rd Cir. 1989) in which the same court held that in the

context of a summary judgment as to one defendant, the presence of remaining, unserved defendants does not interfere with finality for purposes of appeal.

Because the foregoing authority cited in this Section of the Reasons for issuance of the writ clearly shows a distinct rift between decisions in other circuits on one hand, and the decision of the Seventh Circuit below herein on the other, the writ sought should issue for this distinct reason as well.

## CONCLUSION

Wherefore, based on each and all of the foregoing Reasons, petitioners respectfully pray that their Petition for Writ of Certiorari be granted.



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